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Supreme Court of the United States

October Term, 1963

No. 471

JUDY BOND, INC.,

Petitioner,

against

CHARLES KREINDLER, as Financial Secretary of Blouse and Waistmakers Union, Local 25; I. L. G. W. U.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinions and orders below are set forth in the Appendices A, B, C and D to the petition. The opinions below are reported at 36 Misc. 2d 943, 234 N. Y. S. 2d 375 and 36 Misc. 2d 948, 234 N. Y. S. 2d 382. The affirmance of the orders of Special Term by the Appellate Division was made without opinion and is reported at 18 A. D. 2d 1138. The denial of petitioner's motion for leave to appeal to the New York Court of Appeals was without opinion and is reported at 13 N. Y. 2d 595.

Jurisdiction

Jurisdiction of this Court is invoked by the petitioner under 28 U. S. C. § 1257(3).

Questions Presented

1. Whether, in a proceedings brought under the New York State arbitration statute to vacate two labor arbitration awards on the claim that certain provisions of the collective bargaining agreement which prohibit contracting-

out to non-Union contractors in the ladies' garment industry and which also require payments to be made by the employer to certain welfare funds are illegal under the anti-trust laws and on the further ground that such provisions were used to further an alleged conspiracy to violate the Anti-Trust Act, the petitioner was deprived of a hearing where, upon the allegations and evidence submitted at Special Term, the court held the contract provisions to be valid and that no competent proof of an alleged anti-trust conspiracy was offered.

2. Did the state court deprive the petitioner of any federal right in confirming an award of damages based upon an admitted violation of the contracting-out provision and the liquidated damage clause in the collective bargaining agreement?

Manner in Which the Federal Questions Were Presumably Raised

The petitioner, at page 7 of its brief, asserts that:

> "* * * either the petitioner or respondent, through its brief or memorandum of law, called the Court's attention to Section 301, and this Court's decision in Local 174 v. Lucas Flour Co., 369 U. S. 95."

At no point in the proceeding in Special Term or on the appeal to the Appellate Division did the petitioner claim any right to a plenary trial under Section 301 of the Labor Management Relations Act, 1947. Aside from its contention that certain contracting-out provisions and certain pension, welfare and severance pay provisions of the agreement were violative of the federal Anti-Trust Act and Section 302 of that Act, the petitioner did not specifically set up any right under Section 301, but relied wholly upon State law; nor did the petitioner in the court below challenge the validity of the procedures it invoked under the State arbitration statute to vacate the awards as being

in violation of, or repugnant to, any federal law. In the court below, the petitioner made no claim that it was entitled under federal law to any kind of hearing other than that applicable to a motion to vacate an award under the State law.

We respectfully submit that the petitioner did not fulfill the requirements of 28 U. S. C. § 1257(3) and, further, that the petitioner has not adequately complied with the provisions of Rule 23(f) of this Court.

Statement

Upon the complaints of the respondent, herein referred to as "Union," the arbitrator, after extensive hearings (f. 248),* rendered two awards against the petitioner. One award, the Welfare Award, required the petitioner to pay the sum of $22,460.82 due and owing to the Welfare Funds pursuant to articles 9 and 10 of the collective bargaining agreement (ff. 244-256). In its cross-motion (ff. 259-262), at Special Term of the Supreme Court of the State of New York, to vacate this award pursuant to Section 1462 of the Civil Practice Act, petitioner alleged that (1) the arbitrator was guilty of misconduct by refusing to issue a subpoena *duces tecum* for the production of the books and records of the Union and by refusing to hear evidence ruled out by the arbitrator as immaterial since it related to claims by the Union against other employers not germane to the issues before him; (2) that "Articles 9 and 10 of the collective bargaining agreement, as enforced and applied, are illegal and invalid as violations of the anti-trust laws of the United States * * *"; and (3) that Articles 9 and 10 of the agreement "are illegal and invalid as violations of Section 302 of the Labor-Management Relations Act * * *" (ff. 261-262). *The petitioner*

* Unless otherwise stated, figures in parentheses refer to folios in "Papers On Joint Appeal".

made no reference to Section 301(a) of the Labor-Management Relations Act, 1947. After this Court denied *certiorari* in *Budget Dress Corp. v. Joint Board*, 198 F. Supp. 4, aff'd 299 F. 2d 936, cert. denied 371 U. S. 814, petitioner abandoned its claim under Section 302 of the Labor-Management Relations Act, 1947.

The second award (ff. 79-90) the Damages Award, found that the petitioner had violated Article 32 (f. 42) of the agreement, which prohibited the petitioner from contracting-out to non-Union contractors and, pursuant to the liquidated damage clause (Article 33(g)) (f. 53), awarded damages to the Union in the sum of $61,100. The petitioner moved (ff. 19-23) at Special Term, under the procedures of the State arbitration statute, to vacate this award on the grounds: (1) that the arbitrator was guilty of misconduct; (2) that Articles 32 and 33 of the agreement were "illegal and invalid as violations of the anti-trust laws of the United States"; and (3) that Article 33(g) "is illegal and invalid as the imposition of a penalty for violation of a contractual provision in violation of the *laws of the State of New York and the public policy of the State of New York as repeatedly expressed by the courts of New York*" (emphasis supplied) (f. 22). Again the petitioner invoked no right or privilege under Section 301 of the Labor-Management Relations Act, 1947, and apart from its challenge of legality, under the anti-trust laws, made no claim under any federal law.

The petitioner in its petition to this Court, at page 10, asserts that "the arbitrator refused to allow Judy Bond to even subpoena or introduce evidence pertaining to these and other contentions". This statement is not correct. The transcript of the hearings before the arbitrator, which, in violation of Rule 21 of this Court, was not submitted as part of the record to this Court though it was before Special Term and the Appellate Division (f. 358), shows that, at the first hearing before the arbitrator, the peti-

tioner, after stating that in its opinion the contracting-out provisions of the collective bargaining agreement were in violation of the anti-trust laws, declined to try that issue before the arbitrator and declared: "I think it is impossible on the parties here to try the anti-trust case properly before you. There are reams of evidence and etc., which would not only be expensive but useless to pursue this sort of thing" (f. 156). By stipulation (f. 76) between the parties, petitioner "reserved any claim of illegality of the said agreement or of any provision thereof or of any award entered thereon". Thus the petitioner reserved its claim that the agreement was illegal for presentation, if it were so advised, at any subsequent action or proceeding to enforce, confirm, vacate or modify any award entered. The request for a subpoena *duces tecum* of the Union records and the attempt to examine Union witnesses on immaterial matters was not directed towards eliciting evidence bearing upon the claim of anti-trust violation, but was rather an attempt by the petitioner to show that the Union had not enforced the welfare provisions of the agreement with respect to other employers (ff. 324-336, 274-277).

At Special Term, on its motions to vacate each award, the petitioner presented its affidavits (ff. 25-72, 265-293) and argued that Articles 9, 10, 32 and 33 of the agreement were in violation of the anti-trust laws. In support of this contention it alleged: "The effect of the foregoing provisions [Article 32] is to restrict the employers subject to the contract from contracting their work to contractors of their own choice. * * *" (f. 54).

Petitioner submitted to Special Term, as proof of an alleged anti-trust conspiracy, a copy of a federal indictment "against the Union, the Association and others for a conspiracy to violate the anti-trust laws", and a civil action complaint against the same parties alleging an anti-trust conspiracy (ff. 56-57; Exs. E and F). Petitioner then

argued that "the provisions of the contract * * * were used to effect the terms of the conspiracy" (ff. 59-63, 286-290).

With respect to the Damages Award, the petitioner argued below that the liquidated damage provision (Article 33(g)) was an unlawful penalty provision and hence the award of damages for violation of Article 32 of the agreement was illegal under State law (f. 72). Petitioner did not deny that violation of the contracting-out clause (Article 32) caused severe damage to the Union (ff. 121-147); nor did petitioner undertake to show that the damages awarded were disproportionate to the damages sustained by the Union.

Neither in its affidavits nor in its briefs at Special Term or in the Appellate Division, did petitioner refer to Section 301 of the Labor-Management Relations Act in connection with its contention that the Damage Award was an illegal penalty.

The motions to vacate and to confirm the two awards were fully argued at Special Term before Mr. Justice Streit, who thereafter rendered his decisions and orders sustaining the awards and the Appellate Division affirmed without opinion. Nothing in the decisions in the state court is in conflict with any decision of this Court.

Petitioner did no., in any of its briefs at Special Term or in the Appellate Division raise any federal question as to the inadequacy of the hearing it sought when it invoked the procedures of the State Arbitration Act to vacate the awards. It did not contend below that the hearing it sought at Special Term was repugnant to the federal Constitution or to any federal statute concerning hearings on motions to confirm or vacate an arbitrator's award or concerning summary judgment proceedings.

At page 6 of its petition to this Court, Judy Bond states that "Mr. Justice Streit, in two opinions, denied Judy Bond's motions to vacate the awards and granted the

Union's motions to confirm the awards without a hearing of any kind". This is a remarkable distortion of the record and is untrue. This statement reveals the basic fallacy in petitioner's present contention. It conceives a hearing to be more than an opportunity to present its claims or defenses. It confuses the hearing at which it may present its claims with a hearing to resolve a genuine issue of a material fact if such an issue should be found by the Court to be present. Mr. Justice Streit heard the entire case and, upon the merits, decided that the petitioner's contentions were without any foundation as a matter of law. It was not necessary to take any testimony, since the petitioner could not sustain its contention that the provisions of the contract in question were illegal under federal law; and, further, since the petitioner offered nothing in support of its charges of an illegal conspiracy in violation of the anti-trust laws except the copy of the indictment and the civil complaint which, of course, were mere accusations, proof of no illegality and have no evidentiary value.

ARGUMENT

1. The First Question Raises No Federal Question of Any Importance.

The first question presented by the petitioner is:

> "Was petitioner entitled to hearing on the merits to determine whether, as a matter of fact, the contract involved in the arbitration proceedings from which this action arose was used to violate the Federal anti-trust laws?"

This question is addressed to the procedures under state law upon a motion to vacate an award. Section 1459 of the state Civil Practice Act provides that applications to the Court "shall be made and *heard* in the manner provided by law for the making and *hearing* of motions * * * " (emphasis supplied). The petitioner had a hearing on its motions to

vacate the two awards. This procedure was not attacked below as repugnant to federal law.

The petitioner does not show in its petition that it had made out a *prima facie* case that the contract is illegal under the anti-trust laws. It seems to contend merely that upon a motion to vacate an award, the state court was required to order a plenary trial, even though the petitioner offered no competent evidence to establish that the contract on its face is a violation of the anti-trust laws or that it was "used to violate the Federal anti-trust laws".

Petitioner relies wholly upon its own erroneous interpretation of the provisions of the agreement, and upon the federal indictment and the civil action complaint to sustain its charges of anti-trust violation. Manifestly, the prohibition against contracting-out to non-Union contractors is not in violation of the anti-trust laws. *Allen Bradley Co.* v. *Local No. 3*, 325 U. S. 797, and *Allen Bradley Co.* v. *Local No. 3*, 159 F. 2d 669. The contracting-out provision is expressly sanctioned in the ladies' garment industry by Section 8(e) of the Labor-Management Relations Act, 1947, as amended. See *Employing Lithographers of Greater Miami* v. *N.L.R.B.*, 301 F. 2d 20, where the Court sustained the constitutionality of Section 8(e) with specific reference to the garment industry exemption. See also *Davis Pleating & Button Co.* v. *California Sportswear and Dress Ass'n*, 145 F. Supp. 864, and *The California Sportswear & Dress Ass'n, Inc.*, 54 Fed. Trade Dec. 835.

To argue that the Sherman Act condemns what the garment industry exemption in Section 8(e) of the Landrum-Griffin Act allows is, to paraphrase Mr. Justice Frankfurter in *United States* v. *Hutcheson*, 312 U. S. 219, to say that the agreement which is permissible under Section 8(e) may become the road to prison under the anti-trust laws. Such a result would be absurd. See also *Local 24, I.B.T.* v. *Oliver*, 358 U. S. 283, 294-297, and 362 U. S. 605. The

decision of the court below is consistent with the decision in *Kelly* v. *Kosuga*, 358 U. S. 516.

The short of the matter is that the contention of the petitioner that the agreement was in violation of the anti-trust laws was wholly untenable. Under such circumstances, it was not a violation of any federal law for the state court to enter a judgment sustaining and confirming the awards. It is as though a court, upon a motion to dismiss a complaint, held the complaint to be insufficient as a matter of law; or as though, upon a motion for summary judgment, the court, upon consideration of the pleadings and affidavits, granted the motion against the petitioner and entered judgment in favor of the Union. In both such analogous cases there has been a hearing.

The hearing accorded to the petitioner in the state court was not in conflict with federal law. Federal law requires no more. *Minkoff* v. *Scranton Frocks, Inc.*, 172 F. Supp. 870, 877; *Textile Workers Union of America* v. *Lincoln Mills of Ala.*, 353 U. S. 448. We may analogize the proceedings in the state court to a motion for summary judgment under Rule 56 F.R.C.P. in a federal court or to an application to vacate an award under the Federal Arbitration Act, 9 U. S. C. § 10. Summary judgment may be granted "where no genuine issue remains for trial * * * the purpose of the rule is not to cut litigants off from their right to trial by jury *if they really have issues to be tried*". *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 467 (Emphasis supplied). Of course, summary proceedings should be used sparingly, but should be used whenever there are no genuine issues of material fact in the case. There are no genuine issues of fact in the instant case.

The difficulty with the petitioner's argument is that it could not, at Special Term nor in any of the appellate State Courts, show that there remained to be tried any issues of illegality of the contract or of its use. Even now, the best it can offer is the assertion that: "Certainly, the

indictment and complaint indicate that there is substantial basis for Judy Bond's allegations. In the face of such grave accusations by the United States government, the least that can be afforded Judy Bond is a full and complete opportunity to prove its charges" (pp. 12-13 of the petition).

No decision of this Court holds that an arbitrator's award can be vacated or a plenary trial ordered, upon the bare charge asserted by the petitioner. No decision of any court of appeals is in conflict with the decision below, either on the procedure followed or on the alleged merits. Nothing in Section 301 nor in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, *supra*, requires the state or federal court to order a plenary trial in a case so lacking in merit.

The petitioner did not show below, nor does it now show, how a finding of the existence of the alleged conspiracy would impair the right of the Union to enforce the requirement of the contract that the employer shall pay the amounts due to the welfare funds, or the right of the Union to enforce the prohibition against contracting-out to non-Union contractors.

The essence of petitioner's complaint is *not* that it did not have a hearing, or that the procedures of the state act are repugnant to the federal Constitution or to a federal statute but rather that a hearing based upon affidavits is a deprivation of a federal right. No federal right was denied or invaded by the state court in this case. The first question raises no questions of substance. There is no novel question here. There are conflicting decisions here. The first question does not warrant a grant of writ of certiorari.

2. The Second Question, Which Challenges the Damages Award, Raises No Question of Importance Under Federal Law.

The second question is:

> "Whether the award based upon Article 33(g) of the contract is void, as a matter of public policy, as the imposition of a penalty for a breach of the contract."

At no point in the proceedings in the State Court did the petitioner complain that under the federal law the arbitrator could not award damages for the breach of Article 32 of the agreement. It made no claim that under federal law the liquidated damage clause, Article 33(g), was a penalty. It argued from state decisions only and relied particularly upon *Matter of Publishers Ass'n*, 280 A. D. 500; *Seidlitz* v. *Auerbach*, 230 N. Y. 167; *City of New York* v. *Brooklyn & Manhattan Ferry Co.*, 238 N. Y. 52; *Cohen* v. *Berkman*, 130 Misc. 725. The decision of Special Term, affirmed by the Appellate Division, held that the liquidated damage clause was not an unlawful penalty. That decision does not in any way conflict with any decision of this Court.

Under federal law, an arbitrator may award damages for breach of a collective bargaining agreement. *Drake Bakeries* v. *Local 50*, 370 U. S. 254. Under *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, an arbitrator may formulate remedies for violation of a collective bargaining agreement because, said the Court, "the need is for flexibility in meeting a wide variety of situations". If the arbitrator had himself devised the formula embodied in the liquidated damage clause of the agreement to redress the contract violation, his award would be proper and justified, since the damages to the Union were so great (ff. 162-172).

Liquidated damage provisions have long been recognized as valid and enforceable. Thus, in *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 119, this Court:

> "The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and *without proof of the damages sustained*." (Emphasis supplied.)

And more recently, this Court said, in *Priebe & Sons, v. U. S.*, 332 U. S. 407, 411:

> "Today the law does not look with disfavor upon 'liquidated damages' provisions in contracts • • • They serve a particularly useful function where damages are uncertain in nature or amount or are unmeasurable • • • And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. *These provisions are to be judged as of the time of making the contract.*" (Emphasis supplied.)

Said the Court in *United States v. Walkof*, 144 F. 2d 75:

> "The courts after some pulling and hauling have become more tolerant of such provisions [liquidated damages], have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in a recovery of an amount stated as liquidated damages, upon violation of a contract, *and without proof of the damages actually sustained* • • • " (Emphasis supplied.)

And further

> "It seems that a court should look with disfavor upon an attempt to defeat the express words of an agreement entered into voluntarily, knowingly and without any overreaching."

The petitioner did not in the state courts, nor does it now, attempt by evidence to show that the measure of damages set forth in Article 33(g) at the rate of $1.00 per dozen is disproportionate to the damages suffered by the Union.

In sustaining the Damages Award, the state court properly held that the construction of the agreement was for the arbitrator, (*Steelworkers* v. *Enterprise Wheel & Car Corp.* supra) and that the provision in question, as applied to remedy the violation of the contracting-out clause, was not a penalty.

It is therefore respectfully submitted that the second question presented by the petition presents no question of importance in the administration of the law governing the enforcement of labor arbitration awards. The petition for a writ of certiorari with respect to the second question should likewise be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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